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Attorneys for Allstate Insurance Company (erroneously sued as "Allstate Property and Casualty Insurance Company")

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, EASTERN DIVISION

MATTHEW POTURICH AND TERESA POTURICH,

Plaintiffs,

v.

ALLSTATE INSURANCE COMPANY, ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, and DOES 1 through 50, inclusive,

Defendants.

Case No. 5:15-cv-00081-GW-KKx

The Hon. Kenly Kiya Kato
Courtroom 3/4 Third Floor

ALLSTATE'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO COMPEL PLAINTIFFS' DEPOSITIONS AND MOTION FOR SANCTIONS

Date: September 3, 2015
Time: 10:00 a.m.
Dept.: Courtroom 3/4

Complaint Filed: December 12, 2014
Trial Date: January 12, 2016

PRELIMINARY STATEMENT RE LOCAL RULE 37-1

By now, the Court is familiar with Allstate's persistent but futile attempts to meet and confer with Plaintiffs on discovery disputes. Plaintiffs failed to respond to Allstate's meet and confer efforts before Plaintiffs' noticed depositions, failed to appear for their noticed depositions, and subsequently failed to respond to Allstate's meet and confer efforts after their non-appearances. Pursuant to Local Rule 37-2.4, under such circumstances, the moving party must file a declaration from counsel establishing that opposing counsel failed to confer in a timely manner in accordance with Local Rule 37-1.

Here, Allstate attempted to contact Plaintiffs' counsel on three separate occasions in an attempt to informally resolve this discovery dispute. Plaintiffs' depositions were noticed for July 29, 2015, and July 30, 2015. Plaintiffs failed to appear. Moreover, Allstate has not received any response from Plaintiffs or any indication that they intend to reschedule and ultimately, appear for depositions. Pursuant to Local Rules 37-2.4 and 37-4, this motion to compel is proper and necessary.

I. INTRODUCTION

Like the other discovery motions that Allstate has already brought, this motion to compel and for sanctions is based on Plaintiffs' refusal to cooperate and participate in the discovery process. This motion is filed concurrently with a motion for terminating sanctions based on Plaintiffs' failure to comply with the Court's July 15, 2015 Order, requiring Plaintiffs to respond to written discovery that was propounded over three months ago. Also pending before the Court is a motion to compel business records from a business owned by Plaintiff Matthew Poturich.

Now, Plaintiffs are attempting to evade their properly noticed depositions. Plaintiffs failed to confirm their appearance before the depositions, failed to appear at the depositions, and subsequently failed to meet and confer with Allstate to reschedule their depositions. Therefore, Allstate requests that this Court order the following:

(1) Plaintiffs must appear for their depositions on August 18 and 19, 2015;

(2) Plaintiffs shall pay sanctions to Allstate in the amount of $3,960.40 as a result of Plaintiffs' failure to appear at their depositions and to comply with court rules; and

(3) Alternatively, Plaintiffs are precluded from offering any testimony in support of their claims and further precluded from offering any documents requested by Allstate in the deposition notices that Plaintiffs may otherwise offer in support of their claims.

II. STATEMENT OF FACTS

On June 23, 2015, Allstate contacted Plaintiffs' counsel to request Plaintiffs' availability for depositions. (Declaration of Christina Ding ¶ 3, Ex. 1.) After receiving no response, Allstate noticed the deposition of Plaintiff Matthew Poturich for July 29, 2015, and of Plaintiff Teresa Poturich for July 30, 2015. (Ding Dec. ¶¶ 4-5, Ex. 2-3.)

Again receiving complete radio silence, Allstate wrote to Plaintiffs' counsel on July 21, 2015, requesting confirmation of Plaintiffs' appearance for their upcoming depositions. (Ding Dec. ¶ 6, Ex. 4.) Three days later, Allstate wrote again, requesting confirmation of Plaintiffs' appearance for their depositions. (Ding Dec. ¶ 7, Ex. 5.)

On July 28, 2015 – less than 24 hours before the noticed deposition of Plaintiff Matthew Poturich – an assistant for Plaintiffs' counsel advised Allstate that counsel was ill and unavailable for the deposition the following day. (Ding Dec. ¶ 8, Ex. 6.) In a letter sent that same date, Allstate demanded a telephonic meet and confer with Plaintiffs' counsel and that Plaintiffs agree to reschedule their depositions for August 18 and 19, 2015. (Ding Dec. ¶ 9, Ex. 7.) Allstate further demanded a response from Plaintiffs by July 30, 2015, in order to avoid *another* motion to compel. (*Id.*) Plaintiffs failed to respond or appear at their depositions. (Ding Dec. ¶¶ 10-12, Ex. 8-9.) As of the filing of this motion, Plaintiffs have not responded to Allstate or indicated that they would appear for rescheduled depositions. (Ding Dec. ¶ 13.)

III. A MOTION TO COMPEL IS PROPER WHEN A PARTY FAILS TO APPEAR FOR A DEPOSITION

Allstate has a right to depose Plaintiffs without leave of Court. Fed. R. Civ. P. Rule 30. Allstate properly noticed Plaintiffs' depositions on June 26, 2015. (Ding Dec. ¶¶ 4-5, Ex. 2-3.) Plaintiffs failed to appear for their properly noticed depositions. (Ding Dec. ¶¶ 11-12, Ex. 8-9.)

A motion to compel is the appropriate remedy when a party fails to appear for deposition. Fed. R. Civ. P. Rule 37(a)(3). Because Plaintiffs failed to appear for their depositions, Allstate has the right to seek a court order compelling compliance under Rule 37. *Hyde & Drath v. Baker*, 24 F.3d 1162, 1166–67 (9th Cir. 1994) (finding prejudice due to plaintiffs' repeated failure to appear at scheduled depositions, which left defendants without crucial information and unable to construct their defense); *Henry v. Gill Industries, Inc.*, 983 F.2d 943, 947 (9th Cir. 1993) (finding last-minute cancellation constitutes "failure to appear").

Not only have Plaintiffs failed to appear for their depositions, they failed to subsequently respond to Allstate's meet and confer efforts to reschedule their depositions. (Ding Dec. ¶¶ 9-10, Ex. 7.) Given the mediation cutoff date of August 23, 2015, and the discovery cutoff date of October 2, 2015, Allstate respectfully requests that the Court compel Plaintiffs to appear for depositions on August 18 and 19, 2015.

IV. SANCTIONS ARE APPROPRIATE WHERE PARTIES FAIL TO APPEAR FOR DEPOSITIONS AND WHERE PLAINTIFFS' COUNSEL FAILED TO COOPERATE

Federal Rule of Civil Procedure Rule 37(d) allows the Court to impose sanctions against a party who fails to appear for deposition. Here, Allstate incurred over $1,370.40 preparing for and attending Plaintiffs' depositions – at which they failed to appear. (Ding Dec. ¶ 14.) Therefore, Allstate requests that the Court impose monetary sanctions in the amount of $1,370.40 against Plaintiffs.

Local Rule 37-4 also permits the Court to impose sanctions where counsel has failed to comply with or cooperate in the meet and confer procedures under Local Rule 37-1. *Cable & Computer Technology, Inc., supra*, 175 F.R.D. at 650 (sanctioning plaintiff's counsel for failing to comply with local rules requiring meet and confer efforts related to a discovery dispute). As already discussed above, Allstate attempted to meet and confer with Plaintiffs numerous times regarding their depositions. (Ding Dec. ¶¶ 3-10.) Plaintiffs failed to confirm their appearances at the depositions and also failed to respond to Allstate's effort to reschedule the depositions after their non-appearances. (*Id.*)

To date, Allstate has received no response from Plaintiffs regarding this dispute, thereby necessitating the present motion. As set forth in the Declaration of Christina Ding, over four hours was spent researching and preparing this motion, including the supporting declaration and exhibits. (Ding Dec. ¶ 15.) It is anticipated that, at a minimum, an additional three hours will be spent in connection with preparing a reply brief and handling the hearing on this matter. (*Id.*) Therefore, Allstate requests that it be awarded additional monetary sanctions in the amount of $2,590.00, pursuant to Local Rule 37-1.

Beyond monetary sanctions, evidentiary sanctions are also appropriate where a party fails to appear, testify and produce documents at their deposition. *Hilao v. Estate of Marcos*, F.3d 762, 764-765 (9th Cir. 1996) ("As a sanction for Appellants' failure to appear, testify, and produce documents at their depositions, the Court deemed established Plaintiffs' factual allegations in their contempt motions, and further found that those facts were substantiated by evidence produced by Plaintiffs."); *Von Brimer v. Whirlpool Corp.*, 536 F.2d 838, 844 (9th Cir. 1976) ("[E]vidence was excluded, as subsection (b) (2)(B) allows . . .").

Given Plaintiffs' failure to comply with the Court's July 15, 2015 Order requiring Plaintiffs to respond to written discovery, Allstate does not expect Plaintiffs will actually comply with an order from the Court requiring Plaintiffs to appear for depositions. Therefore, in lieu of ordering Plaintiffs to appear for depositions, Allstate requests that the Court exclude any and all testimony by Plaintiffs and further preclude Plaintiffs from relying upon documents that were requested by Allstate from Plaintiffs in their deposition notices.

V. CONCLUSION

Based on Plaintiffs' noncompliance as outlined above, Allstate respectfully requests that this Court order the following:

(1) Plaintiffs must appear for their depositions on August 18 and 19, 2015;

(2) Plaintiffs shall pay sanctions to Allstate in the amount of $3,960.40 as a result of Plaintiffs' failure to appear at their depositions and to comply with court rules; and

(3) Alternatively, Plaintiffs are precluded from offering any testimony in support of their claims and further precluded from offering any documents requested by Allstate in the deposition notices that Plaintiffs may otherwise offer in support of their claims.

Dated: August 5, 2015 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By s/ Christina Ding
CHRISTINA DING

Attorneys for Allstate Insurance Company
(erroneously sued also as Allstate Property and
Casualty Insurance Company)